No. 86-1659 (6)

In the Supreme Court of the United States

OCTOBER TERM, 1987

CONTINENTAL CAN COMPANY, PETITIONER

v.

ROBERT GAVALIK, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether participants in an employee benefit plan may bring suit alleging that they were laid off so that they would not qualify for pension benefits, in accordance with their employer's "liability avoidance program" and contrary to Section 510 of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1140, without first exhausting the plan's grievance and arbitration procedures.

2. Whether the timeliness of a Section 510 claim is appropriately governed by a state six-year limitations period applicable to employment discrimination claims.

3. Whether, in a Section 510 class action, the employer properly bears the burden of proving, at the remedial stage, that members of the class would have been permanently laid off even if the employer had not devised an unlawful program to interfere with their attainment of pension eligibility.

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This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. Petitioner, Continental Can Company, is a multistate employer that has established, through collective bargaining, a comprehensive pension plan for employees represented by the United Steelworkers of America. The "normal" pension plan provides that participants may retire and receive a pension at age 62. Pet. App. 69a. Break-in-service pensions are provided, in the event of a plant closing or involuntary layoff of two years or more, to employees who meet specified age and years of service requirements but do not qualify for normal pensions.[1] Under Section 510 of the Employee Retirement

[1] The plan provides that laid-off employees qualify for break-in-service pensions if: they have completed 20 years of service and their

Income Security Act of 1974 (ERISA), 29 U.S.C. 1140, it is unlawful "for any person to discharge * * * or discriminate against a participant * * * for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan."

In 1976, in a period of declining business, Continental Can developed what it termed a "liability avoidance" program (Pet. App. 11a, 80a), which was an intricate scheme to reduce its workforce in a manner that would minimize the number of its employees qualifying for break-in-service pensions. The program's objective was "to identify Continental's unfunded pension liabilities so as to avoid triggering future vesting by placing employees who had not yet become eligible for break-in-service on layoff, and to retain those employees whose benefits had already vested" (*id.* at 12a). Under the program, Continental Can identified which of its plants had the greatest potential pension liabilities and which of its employees lacked the age and service requirements to qualify for break-in-service pensions (*id.* at 12a, 40a-41a, 77a). It then "capped" employment at various plants, limiting the size of their workforces so that many employees not yet vested for break-in-service pensions were permanently laid off. The employees, however, were not told that their layoffs were considered permanent (*id.* at 13a, 78a). To assure that these laid-off, nonvested employees could not vest as a result of a recall, Continental Can developed a "red flag" system to alert top-level management whenever an employee designated as permanently laid off received a pay check (*id.* at 13a, 41a, 80a). Continental Can also deviated from its previous practice of adjusting staffing to

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combined age and years of service equals 65 or more; or they are at least 50 years old with 15 years of service and their combined age and years of service equals 70 or more; or they have 15 years of service and their combined age and years of service equals 75 or more (Pet. App. 69a-70a).

meet the anticipated volume of business, instead tailoring the volume of business to fit the plant's cap. Where work could not be completed at a capped plant by working vested employees overtime, it was shifted to other plants. *Id.* at 12a n.13, 13a, 78a-79a.

Continental Can implemented its liability avoidance program at its plant in Pittsburgh, Pennsylvania, capping the plant in 1976 and subsequent years, and permanently laying off numerous employees (Pet. App. 14a-15a, 41a-43a, 89a). Continental Can closed the plant in 1981 (see *id.* at 48a n.40). Respondents are all former employees and participants in petitioner's pension plan, who, without having met the break-in-service pension eligibility requirements, were permanently laid off from the Pittsburgh plant between January 1976 and May 1978. Many of them were very close to qualifying for break-in-service pensions when laid off. *Id.* at 15a & n.17, 90a. In 1981, several respondents sued Continental Can, alleging that it had violated Section 510. After discovery uncovered the liability avoidance program, other respondents filed a separate action, later certified as a class action and consolidated with the first one, specifically challenging that program and its implementation in Pittsburgh. Pet. App. 16a.[2]

2. The district court denied Continental Can's motions to dismiss for failure to exhaust the grievance procedure

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[2] Petitioner's liability avoidance program has also been challenged in California and Alabama. See *Amaro* v. *Continental Can Co.*, 724 F.2d 747 (9th Cir. 1984) (remanded for liability determination); *Mason* v. *Continental Group, Inc.*, 763 F.2d 1219 (11th Cir. 1985), cert. denied, 474 U.S. 1087 (1986) (dismissed for employees' failure to exhaust pension plan remedies). A district court in New Jersey, relying on the instant case, has recently held, in a nationwide class action (excluding the plaintiffs in this case, *Amaro*, and *Mason*), that Continental Can's liability avoidance program violates ERISA. *McLendon* v. *Continental Group, Inc.*, 660 F. Supp. 1553 (D.N.J. 1987).

set forth in the pension agreement.[3] The pension plan provides for the resolution of disputes "as to whether or not such Employee is entitled to or as to the amount of" a pension (Pet. App. 126a). The court first held that respondents' claims are not covered by the plan's grievance procedure since respondents are "neither applicants for a pension nor in dispute with [Continental Can] as to whether or not they are entitled to a pension," explaining that their claim "is not that they have been denied their pensions, but that they have been denied the opportunity to eventually become entitled to a pension." Br. in Opp. App. 13a. The court also concluded that Section 510 "confer[s] * * * a statutory right independent of the collective bargaining agreement" that established the pension agreement, and held that such an independent statutory right may be enforced in court whether or not an employee had filed a grievance. Br. in Opp. App. 13a-14a.

The district court also rejected Continental Can's contention, made in a subsequent motion to dismiss, that in the absence of an express limitations period governing Section 510 claims, it should borrow either the six-month statute of limitations of Section 10(b) of the National Labor Relations Act, 29 U.S.C. 160(b), or the two-year state limitations period applicable to actions for intentional interference with contractual relations. In the court's view, respondents' Section 510 claims are most analogous to "an action charging employment discrimination or a suit alleging breach of a fiduciary duty, both of which are subject to the 6-year residuary period of limitations set forth in 42 Pa.C.S.A. § 5527(6)." Br. in

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[3] The pension agreement provides for the filing of grievances in accordance with the provisions of the collective bargaining agreement (Pet. App. 120a). That agreement, in turn, provides that the union can call for a meeting with a Continental Can employee (*id.* at 109a-110a). The union may then invoke arbitration procedures if not satisfied with the company's resolution of the dispute (*id.* at 110a).

Opp. App. 18a-19a. It accordingly borrowed that six-year statute of limitations.

Following trial on the issue of liability under Section 510, the district court found that a "motivating factor" in the cap and layoff decisions was to prevent respondents from becoming eligible for break-in-service pensions, but ruled, nevertheless, that Continental Can had not violated Section 510. Pet. App. 90a-91a. In the court's view, respondents were required to "prove not only that their impending pension eligibility made a difference in Continental's decisions that resulted in their layoffs, but also that those decisions and, consequently, their layoffs would not have occurred for any other reason" (*id.* at 53a (footnote omitted); see *id.* at 61a-64a). Under this view, the court concluded that respondents had not met their burden of proof on liability and accordingly entered judgment for Continental Can without reaching the question of damages to individual class members.

3. Relying on its prior decision in *Zipf* v. *AT&T*, 799 F.2d 889 (1986), the court of appeals affirmed the district court's conclusion that employees asserting Section 510 claims need not exhaust plan remedies before seeking relief in federal court (Pet. App. 30a-33a). The court of appeals also affirmed the district court's application of the six-year limitations period borrowed from state law, agreeing with the district court that a Section 510 action is most analogous to an employment discrimination action (*id.* at 17a-18a, 23a).

The court of appeals reversed the district court's conclusion that petitioner had not violated Section 510 of ERISA. Relying on the district court's factual findings that Continental Can established its "liability avoidance program" with the specific intention of interfering with the class members' pension eligibility, the court held that respondents had carried their burden of proving a pattern

or practice of discrimination sufficient to justify injunctive relief, if necessary. Pet. App. 37a, 43a n.36, 47a-48a. Indeed, the court concluded, the liability avoidance program, whose "*sole* purpose" (*id.* at 47a n.39 (emphasis in original)) was to prevent employees from attaining pension eligibility, was so "infested with discriminatory intent" that the court was "hard pressed" to imagine that anything would violate Section 510 if it did not (Pet. App. 45a). In the court's view, the district court incorrectly required respondents to prove in the liability phase that, despite petitioner's discriminatory motivation, they would not have lost work for any other reason (*id.* at 61a, 64a). It held that Continental Can could limit its damages to members of the class by proving in the remedial stage that they would have lost work without qualifying for a pension in the absence of the liability avoidance program, and it remanded the case to the district court to provide petitioner that opportunity (*id.* at 65a-66a).

ARGUMENT

1. *Exhaustion.* The courts below correctly concluded that respondents are not barred from bringing their Section 510 claims because they failed to exhaust grievance and arbitration remedies. Although this issue may warrant review by this Court because there is an express conflict in the circuits, the Court should not grant this petition because this case does not present a clear opportunity to resolve the conflict.

a. Respondents allege a *statutory* violation. They contend that Continental Can violated Section 510 by laying them off so that they would not qualify under the plan for break-in-service pensions. Section 502(a)(3) of ERISA, 29 U.S.C. 1132(a)(3), provides that plan participants may bring suit to enforce the requirements of ERISA.[4] The

[4] Section 502(a)(3), 29 U.S.C. 1132(a)(3), provides that plan participants may bring suit "(A) to enjoin any act or practice which vio-

Third and Ninth Circuits have concluded that exhaustion is not normally required before a plaintiff brings suit under Section 502(a)(3) alleging a violation of Section 510. Pet. App. 30a-33a; *Zipf* v. *AT&T*, 799 F.2d 889 (3d Cir. 1986), *reprinted in* Br. in Opp. App. 1a-11a; *Amaro* v. *Continental Can Co.*, 724 F.2d 747 (9th Cir. 1984). We agree with that conclusion.

As the court in *Zipf* explained (Br. in Opp. App. 5a), it is important to distinguish between actions brought "to enforce the terms of a plan" and actions brought "to assert rights granted by the federal statute." Congress established a scheme for internal plan review of benefit claims.[5] Section 502(a)(1), 29 U.S.C. 1132(a)(1), provides that plan participants may bring suit alleging that they are entitled to benefits under the terms of a plan,[6] and Section 502(a)(3), 29 U.S.C. 1132(a)(3), also authorizes suits to enforce the terms of the plan. See n.4, *supra*. Exhaustion

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lates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan."

[5] Section 503, 29 U.S.C. 1133, mandates that plans establish procedures under which participants may challenge benefit claim decisions. ERISA's legislative history shows that Congress modeled ERISA's benefit claim provisions on Section 301 of the Labor-Management Relations Act, 29 U.S.C. 185. See H.R. Conf. Rep. 93-1280, 93d Cong., 2d Sess. 327 (1974). Under Section 301, employees asserting claims under a collective bargaining agreement generally must exhaust available arbitral remedies and the arbitral decision is accorded deference. See, *e.g.*, *DelCostello* v. *Int'l Brotherhood of Teamsters*, 462 U.S. 151, 163-164 (1983).

[6] Section 502(a)(1)(B), 29 U.S.C. 1132(a)(1)(B), provides that a plan participant may bring suit "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan."

of the remedies available under a plan normally is required prior to bringing a benefit claim suit.[7] It is sensible and appropriate to require exhaustion in such cases, as the meaning of the terms of the plan are at issue and the conclusions of those charged by the plan with resolving disputes over benefit claims should be of assistance to courts reviewing benefit claims.

In contrast to benefit claims, Congress intended claims alleging violations of provisions of ERISA to be within the "exclusive jurisdiction" of federal courts. See H.R. Conf. Rep. 93-1280, 93d Cong., 2d Sess. 327 (1974); see also 119 Cong. Rec. 30044 (1973) (statement of Sen. Javits). Congress considered, but rejected, a proposal to establish an administrative tribunal to consider claims alleging violations of Section 510. See 119 Cong. Rec. 30374, 30400 (1973). There is, accordingly, no reason to think that Congress intended to require exhaustion of any other remedy before initiation of a Section 510 claim. Furthermore, as the court in *Zipf* explained (Br. in Opp. App. 8a): "Unlike a claim for benefits brought pursuant to a benefits plan, a Section 510 claim asserts a statutory right which plan fiduciaries have no expertise in interpreting. Accordingly, one of the primary justifications for an exhaustion requirement in other contexts, deference to administrative expertise, is simply absent. * * * Moreover, statutory interpretation is not only the obligation of the courts, it is a

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[7] Both the Third Circuit and the Ninth Circuit have held that exhaustion is a prerequisite to the filing of a benefit claim suit. *Wolf* v. *National Shopmen Pension Fund*, 728 F.2d 182, 185 (3d Cir. 1984); *Amato* v. *Bernard*, 618 F.2d 559, 568 (9th Cir. 1980). Like the Third Circuit in *Zipf* (Br. in Opp. App. 5a), the Ninth Circuit in *Amaro* (724 F.2d at 751) expressly distinguished its prior decision holding that exhaustion was required prior to bringing a benefit claim suit in concluding that exhaustion is not required before alleging a statutory violation.

matter within their peculiar expertise." There is, therefore, no good reason to require exhaustion as a prerequisite to the filing of a Section 510 claim.

The decisions in *Zipf* and *Amaro* are strongly supported by this Court's recent decision in *Atchison, T. & S.F. Ry.* v. *Buell,* No. 85-1140 (Mar. 24, 1987), that exhaustion of the remedies available under a collective bargaining agreement is not required prior to bringing suit under the Federal Employers' Liability Act, 45 U.S.C. 51 *et seq.* The Court based its decision on the conclusion that the policies favoring arbitration are not persuasive in cases involving the assertion of " 'rights arising out of a statute designed to provide minimum substantive guarantees to individual workers.' " *Buell,* slip op. 7-8 (quoting *Barrentine* v. *Arkansas-Best Freight Sys., Inc.,* 450 U.S. 728, 737 (1981)).[8] ERISA generally is directed at providing such "minimum standards" (29 U.S.C. 1001(a)), and Section 510 in particular has such a purpose.[9] Accordingly, plaintiffs should not generally be required to file grievances before filing Section 510 claims.

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[8] See also *McDonald* v. *City of West Branch,* 466 U.S. 284 (1984) (civil rights action under 42 U.S.C. 1983); *Alexander* v. *Gardner-Denver Co.,* 415 U.S. 36 (1974) (Title VII of the Civil Rights Act of 1964); *U.S. Bulk Carriers, Inc.* v. *Arguelles,* 400 U.S. 351 (1971) (Seaman's Wage Act); *McKinney* v. *Missouri-K.-T. R.R.,* 357 U.S. 265 (1958) (seniority rights under Universal Military Training and Service Act).

[9] See 29 U.S.C. 1001(a); *Central States, S.E. & S.W. Areas Pension Fund* v. *Central Transp., Inc.,* 472 U.S. 559, 567-570 (1985) (ERISA was enacted to provide "minimum standards" to assure the "equitable character" of employee benefit plans and to promote the well-being and security of employees and their dependents); S. Rep. 93-127, 93d Cong., 1st Sess. 36 (1973) (in some plans "a worker's pension rights or the expectations of those rights were interfered with by the use of economic sanctions," and Section 510 was intended to "preclude this type of abuse" and to "completely secure the rights and expectations [under ERISA]").

Furthermore, as the courts below concluded (Br. in Opp. App. 13a; Pet. App. 29a), exhaustion is plainly not warranted here because there is no procedure to exhaust. The pension plan agreement authorizes the filing of benefit claims only; it provides for the filing of grievances "as to whether or not such Employee is entitled to or as to the amount of such * * * pension" (Pet. App. 126a). Respondents neither contend that they are entitled to pensions nor are engaged in a dispute over the amount of their pensions, since they admittedly do not qualify for pensions under the terms of the plan. Instead, they seek equitable relief for Continental Can's manipulation of their employment status, in violation of Section 510, which they assert caused them to be ineligible for benefits under the plan.[10]

Petitioner suggests (Pet. 9 n.5) that respondents' claims could be brought under the grievance procedure provided by the collective bargaining agreement independent of their rights under the pension plan. The courts below did not find it necessary to respond to that unmeritorious contention. Respondents' claim is not arbitrable under the collective bargaining agreement, which provides for the filing of grievances concerning "the interpretation or application of or compliance with this Agreement" (Pet. App. 105a). Cf. *Iowa Beef Packers, Inc.* v. *Thompson*, 405 U.S. 228,

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[10] Petitioner suggest (Reply Br. 2 n.2) that a pension plan remedy exists here for Section 510 violations based on a statement in the summary description of the plan informing participants of their right under Section 510 to be free from discrimination (Pet. App. 124a). There is no merit to that suggestion. The Department of Labor requires plans to include such a statement. 29 C.F.R. 2520.102-3(t)(2). The statement merely informs participants of their statutory rights, and does not itself create a separate and distinct remedy under the plan.

229-230 (1972).[11] Respondents do not allege noncompliance with the collective bargaining agreement, but instead allege a violation of Section 510.[12]

b. Both the Seventh and Eleventh Circuits, in conflict with the Third and Ninth Circuits, have concluded that exhaustion of plan remedies is required before a plaintiff

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[11] The question presented in *Iowa Beef Packers* was whether exhaustion was required before bringing suit under the Fair Labor Standards Act to recover overtime compensation. The relevant collective bargaining agreement in that case, like the agreement here, applied "only to grievances 'pertaining to a violation of the Agreement' " (405 U.S. at 230). The Court contrasted that agreement with the agreement in *U.S. Bulk Carriers, Inc.* v. *Arguelles*, 400 U.S. 351 (1971), which provided for the "resolution of all disputes and grievances, not merely those based on alleged violations of the contract" (405 U.S. at 229). The Court dismissed the petition in *Iowa Beef Packers* as improvidently granted after learning at oral argument that the grievance procedure was limited to the resolution of alleged violations of the collective bargaining agreement (*id.* at 229-230).

[12] Petitioner contends (Supp. Br. 1-3) that this Court's recent decision in *Shearson/American Express Inc.* v. *McMahon*, No. 86-44 (June 8, 1987), supports its argument that respondents should be barred from pursuing their Section 510 claims. There is no merit to that contention. In *Shearson/American Express*, as in *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), this Court upheld, under the Federal Arbitration Act, 9 U.S.C. 1 *et seq.*, agreements to arbitrate disputes. There was no agreement to arbitrate the dispute at issue since, as we have shown (pp. 10-11, *supra*), neither the pension plan nor the collective bargaining agreement provides for the consideration of respondents' claim. Moreover, the Court in *Shearson/American Express* recognized (slip op. 5) that the question there was whether Congress intended to authorize agreements to arbitrate particular statutory questions. Since Congress does not generally intend to bar employees from obtaining judicial review of claims arising under statutes providing minimum guarantees to individual workers (see p. 9 & [redacted] n.8, *supra*), the analysis in *Shearson/American Express* leads to the conclusion that exhaustion is not required here.

may bring a Section 510 claim. *Dale* v. *Chicago Tribune Co.*, 797 F.2d 458, 465-467 (7th Cir. 1986), cert. denied, No. 86-933 (Jan. 27, 1987); *Kross* v. *Western Elec. Co.*, 701 F.2d 1238, 1243-1245 (7th Cir. 1983); *Mason* v. *Continental Group, Inc.*, 763 F.2d 1219, 1224-1227 (11th Cir. 1985), cert. denied, 474 U.S. 1087 (1986). The conflict is express. Br. in Opp. App. 4a-5a (*Zipf*); *Mason*, 763 F.2d at 1226-1227; *Amaro*, 724 F.2d at 751-752. Accordingly, it would seem that review by this Court is warranted since the issue is certain to arise again and is of considerable importance to the millions of employees covered by pension plans.[13]

Respondents argue (see Br. in Opp. 15-16) that review is not warranted because the decisions of the Seventh and Eleventh Circuits are so clearly wrong that those Circuits may reverse themselves. As respondents state, those courts did not appreciate the distinction between benefit claims and statutory claims.[14] This Court's recent decision in *Atchison, T. & S.F. Ry.* v. *Buell* (see p. 9, *supra*) might provide an occasion for those Circuits to reconsider their

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[13] Two members of this Court dissented from the denial of the petition for a writ of certiorari in *Mason*. As petitioner states (Pet. 7), the conflict in the circuits has since expanded as a result of the Third Circuit's decisions here and in *Zipf*.

[14] District courts and commentators have criticized the Seventh and Eleventh Circuits for failing to recognize the distinction between benefit claims and statutory claims. *Treadwell* v. *John Hancock Mutual Life Ins. Co.*, 666 F. Supp. 278, 284 (D. Mass. 1987); *Manser* v. *Missouri Farmers Ass'n*, 652 F. Supp. 267, 272 (W.D. Mo. 1986); *Allen* v. *American Home Foods, Inc.*, 644 F. Supp. 1553, 1563 n.10 (N.D. Ind. 1986); Note, *Civil Actions Under ERISA Section 502(a): When Should Courts Require That Claimants Exhaust Arbitral or Intrafund Remedies?*, 71 Cornell L. Rev. 952, 981 (1986); see also Utz & Martucci, *Unlawful Interference with Protected Rights Under ERISA*, 42 J. Mo. B. 177, 183-184 (1986).

decisions. However, the Ninth Circuit in *Amaro* (724 F.2d at 751) explained the difference between benefit claims and statutory claims in distinguishing its decision from its prior decision in *Amato* v. *Bernard*, 618 F.2d 559, 568 (9th Cir. 1980), and it also reviewed this Court's line of cases preceding *Atchison, T. & S.F. Ry.* v. *Buell* (see n.8, *supra*). Nevertheless, after the decision in *Amaro* was published the Seventh Circuit held in *Dale* that the rule in that Circuit is that district courts may require exhaustion and the Eleventh Circuit concluded in *Mason* that exhaustion is required prior to the initiation of a Section 510 claim, expressly rejecting (763 F.2d at 1226-1227) the holding in *Amaro*. It is therefore less than clear that the Seventh and Eleventh Circuits will correct their prior decisions.

Although the Court will most likely have to consider at some time whether exhaustion is required before suit is filed under Section 510, that issue would probably not be resolved were the Court to hear this case. The courts below based their conclusion that exhaustion was not required in part on the fact that there was no opportunity under the plan at issue to obtain relief by filing a grievance. That conclusion is plainly correct. Accordingly, if the Court grants the petition, it will most likely conclude that exhaustion was not warranted here because there was no procedure to exhaust, a rather unsurprising conclusion that would settle nothing of importance.[15] As in *Iowa Beef Packers* (see n.11, *supra*), the Court might then dismiss

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[15] It is correct, as petitioner notes (Reply Br.1), that the Eleventh Circuit in *Mason* held that exhaustion was required in a case also involving Continental Can. The court appeared to be unaware, however, that relief was unavailable under the terms of the relevant agreements. Even if it is assumed that the court implicitly decided that there was some procedure to exhaust, it would not be sensible to grant the petition for a writ of certiorari here to resolve a conflict over the

the petition as improvidently granted. In our view, the Court should wait for a Section 510 case where there is an opportunity to obtain relief through the filing of a grievance, and then grant that case to determine whether exhaustion should be required.

2. *Statute of limitations.* There is no allegation that the decision to borrow Pennsylvania's six-year statute of limitations for employment discrimination claims conflicts with any decision of another court of appeals or the Pennsylvania Supreme Court. Contrary to petitioner, that decision is consistent with this Court's decisions. Therefore, there is no reason to review the statute of limitations issue.

No express limitations period is set forth to govern Section 510 claims.[16] In such circumstances, a court's " 'task is to "borrow" the most suitable statute or other rule of timeliness from some other source.' " *Agency Holding Corp.* v. *Malley-Duff & Assocs.*, No. 86-497 (June 22, 1987), slip op. 3 (quoting *DelCostello* v. *Int'l Brotherhood of Teamsters*, 462 U.S. 151, 158 (1983)). Congress generally may be presumed to have intended a state rather than federal period to apply, given its awareness of this Court's longstanding practice of borrowing state periods. *Agency Holding Corp.*, slip op. 4. A federal statute of limitations should be borrowed only when federal law " 'clearly provides a closer analogy than available state statutes,' " and

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interpretation of Continental Can's pension and collective bargaining agreements. That is especially so since the *Mason* litigation has concluded, so that it is not possible to provide relief to the employees who brought that suit.

[16] ERISA contains a statute of limitations that prescribes that suits alleging breaches of fiduciary duty generally must be brought within six years of the date of the breach. 29 U.S.C. 1113. However, that statute of limitations expressly applies only to actions alleging violations of 29 U.S.C. (& Supp. III) 1101-1114, which govern "fiduciary responsibility," and hence does not apply by its terms to Section 510 claims.

" 'the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking' " (*ibid.* (quoting *DelCostello*, 462 U.S. at 172)).

The courts below followed the principles established by this Court. The courts characterized respondents' claim as an employment discrimination claim, which is entirely accurate. Looking to state law, the courts concluded that a six-year statute of limitations applies to such claims (Br. in Opp. App. 19a; Pet. App. 18a). That conclusion also appears to be correct. As noted in *Ulloa* v. *Philadelphia*, 95 F.R.D. 109, 114 & n.5 (E.D. Pa. 1982), the six-year statute of 42 Pa. Cons. Stat. Ann. § 5527 (Purdon 1981) applies to claims brought under Pennsylvania's Human Relations Act, Pa. Stat. Ann. tit. 43, § 951 (Purdon 1964), which proscribes various sorts of employment discrimination.[17] Since in Pennsylvania a six-year statute governs employment discrimination claims, it is appropriate that such a period should govern Section 510 claims brought there, in the absence of compelling reasons to borrow another period from a federal statute.[18]

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[17] Petitioner appears to contest (Pet. 23-24) the choice of Section 5527 as the most analogous state statute of limitations. There is no apparent merit to their argument. In any event, as respondents state (Br. in Opp. 20), that is not a question warranting this Court's attention.

[18] Petitioner suggests (Pet. 21-22) that, if a state statute of limitations governs Section 510 claims, Pennsylvania's two-year statute of limitations governing personal injury claims, 42 Pa. Cons. Stat. Ann. § 5524 (Purdon 1981), should be borrowed. There is no merit to that suggestion, as Section 510 claims are clearly more analogous to employment discrimination claims than to personal injury tort claims. Petitioner's argument is based primarily on this Court's conclusion in *Wilson* v. *Garcia*, 471 U.S. 261, 276 (1985), that claims brought under 42 U.S.C. 1983 must be brought within the time allowed by the applicable state statute of limitations governing "tort action[s] for the

Petitioner contends (Pet. 18-21), relying primarily on *DelCostello*, that the six-month statute of limitations of Section 10(b) of the National Labor Relations Act, 29 U.S.C. 160(b), ought to be borrowed and applied. However, the reasons that persuaded the Court in *DelCostello* to depart from the normal practice of borrowing a state statute of limitations are not present here. The claims in *DelCostello* were "hybrid § 301/fair representation claim[s]" in which employees alleged both breaches of collective bargaining agreements by their employers and breaches of their unions' duty of fair representaion (462 U.S. 164-165). The Court found that such a claim "has no close analogy in ordinary state law" (*id.* at 165). Here, in contrast, respondents' claim is reasonably analogized to an employment discrimination claim in violation of Pennsylvania's Human Relations Act.

More importantly, the adoption of a six-month period would conflict with the policies underlying Section 510. Congress enacted Section 510 to "completely secure the rights and expectations" of plan participants (S. Rep. 93-127, 93d Cong., 1st Sess. 36 (1973)), and intended generally to remove "procedural obstacles" that had kept plan participants from asserting their rights (*id.* at 35). Congress evidently believed that allowing plan participants six years in which to bring suit would not impair defendants' ability to respond to claims or otherwise infringe upon their interests, since it enacted a basic six-year time limit for fiduciary breach actions. 29 U.S.C. 1113(a)(1).

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recovery of damages for personal injuries." However, as the Court noted, Section 1983 was enacted in 1871 to prohibit "whippings and lynchings" by the Ku Klux Klan (471 U.S. at 276). Thus, "[t]he atrocities that concerned Congress in 1871 plainly sounded in tort" (*id.* at 277) and it was reasonable to analogize Section 1983 to a personal injury tort statute. Congress enacted Section 510 to prohibit employers from discriminating against employees on the basis of their pension status, and it is therefore properly considered to be an employment discrimination statute, not a personal injury tort statute.

Part of Congress's interest in establishing a relatively long limitations period was "to impress upon those vested with the control of pension funds the importance of the trust they hold." *Brock* v. *Nellis*, 809 F.2d 753, 754 (11th Cir. 1987). It seems unlikely that Congress intended to impress upon employers any lesser sense of the importance of pension rights, or to provide them any "eas[y] * * * refuge" from suit (*ibid.*).[19] Accordingly, there are no compelling reasons to adopt the six-month statute of limitations of Section 10(b) of the National Labor Relations Act. Rather, there are compelling reasons to adopt a longer statute.

3. *Burdens of proof.* The court below was the first court of appeals to rule on the proper allocation of the burdens of proof in a Section 510 class action. Its ruling that Continental Can bears the burden of proving at the remedial stage that individual members of the class would have been laid off without qualifying for a pension in the absence of Continental Can's unlawful liability avoidance program is entirely in accord with this Court's rulings in parallel employment discrimination contexts. Review of this issue is therefore unwarranted.

There is no question that Section 510 prohibits precisely the kind of scheme that Continental Can devised here. Section 510 bars discrimination "for the purpose of interfering with the attainment of any right to which such par-

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[19] In addition, Congress specifically provided that the beginning of the six-year period against fiduciaries is tolled until the date a breach of duty or violation is discovered in cases of "fraud or concealment" (29 U.S.C. 1113(a)), thus demonstrating a willingness to extend indefinitely limitations periods against pension plan fiduciaries. Congress could hardly have intended that employers such as Continental Can should be protected from suit after six months when they adopt and implement secret liability avoidance programs that prevent employees from qualifying for pension benefits. The lower courts found it unnecessary to decide whether tolling is appropriate in this case. See Br. in Opp. 20 n.8; Br. in Opp. App. 19a n.1.

ticipant may become entitled," and the "sole purpose" (Pet. App. 47a) of Continental Can's liability avoidance program was to prevent employees from qualifying for break-in-service pensions. As the court of appeals explained (*id.* at 47a n.39), the purpose of Section 510 is to prevent employers from circumventing vesting requirements by discharging employees before they vest, whether motivated by malice toward particular employees or by concern for the economic condition of the company. See 119 Cong. Rec. 30387-30388 (1973) (remarks of various senators). Like the court of appeals (Pet. App. 45a), we would be "hard pressed" to imagine that anything would violate Section 510 if this does not.

Petitioner contends that the court of appeals erred by not permitting it to prove at the class liability stage that it would have taken the same actions even absent its unlawful discriminatory motivation. This assertion is meritless. This Court requires that in employment discrimination class actions the class representatives must prove a pattern or practice, rather than just isolated instances, of discrimination; the discriminatory practice must be the employer's "standard operating procedure." *Cooper* v. *Federal Reserve Bank*, 467 U.S. 867, 876 (1984); *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 361-362 (1977). Respondents met that burden by proving the existence of petitioner's liability avoidance program and its implementation at Pittsburgh (Pet. App. 43a & n.36, 47a). They would have been entitled to classwide, prospective injunctive relief had the Pittsburgh plant not closed (*id.* at 47a, 48a n.40). They are also entitled to an inference that individual employment decisions taken while the policy of discrimination was in effect were taken in pursuit of that policy. *Teamsters*, 431 U.S. at 361-362; *Franks* v. *Bowman Transp. Co.*, 424 U.S.

747, 772 (1976); Pet. App. 47a, 55a, 61a; see *Cooper*, 467 U.S. at 876.[20]

Nothing in *Mount Healthy City Sch. Dist. Bd. of Educ.* v. *Doyle*, 429 U.S. 274 (1977), which was not a class action, is to the contrary. The Court there held that, once the plaintiff had established that a constitutionally protected action was a motivating factor in the decision not to rehire him, the burden was on the *employer* to show "by a preponderance of the evidence that it would have reached the same decision as to [the plaintiff's] reemployment even in the absence of the protected conduct" (*id.* at 287). That is what the court of appeals ordered here. Under its order, Contintental Can will have the opportunity on remand to prove that respondents are not entitled to compensatory relief. It has so far suffered no monetary liability and, if it meets its burden for all class members, will have none.[21] Thus, contrary to petitioner (Pet. 24-30), the decision in *Mount Healthy* supports the court of appeals' decision.

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[20] In a case involving one instance of discrimination, where the plaintiff has established a prima facie case and the employer has presented evidence in rebuttal, the burden of persuasion that the employer intentionally discriminated against the plaintiff is on the plaintiff. See, *e.g.*, *Cooper*, 467 U.S. at 875. Here, in a pattern and practice class action, respondents have established that Continental Can violated Section 510 by implementing policies to minimize the company's pension liability. The remaining question of the appropriate relief, if any, due individual members of the class is separate from the issue of whether there has been a statutory violation. The court of appeals properly placed the burden on Continental Can to show that individuals would have been laid off without qualifying for break-in-service pensions even absent the violation of Section 510.

[21] The court of appeals specifically noted that Continental Can may present proof, if appropriate "collectively as to all of the plaintiffs" (Pet. App. 65a), that respondents would have been laid off without qualifying for break-in-service pensions in the absence of its liability avoidance program.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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